



March 28, 2013

SUPREME COURT SIDES WITH THE EPA ON "LOGGING ROAD" INTERPRETATION OF CLEAN WATER ACT REGULATIONS

On March 20, 2013, the U.S. Supreme Court decided *Decker, Oregon State Forester v. Northwest Environmental Defense Center* ("NEDC"), 2013 WL 1131708. The specific issue in the case was whether Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permits were required before channeled stormwater run-off from logging roads could be discharged into navigable waters. The Act requires permits for the discharge of pollutants from point sources into navigable waters.

Initially, the Court addressed two secondary issues—jurisdiction and mootness. Jurisdiction was raised because the suit was filed under the Citizen Suit provisions of the Clean Water Act (33 U.S.C. §1365), which requires pre-suit notice but does not have a specific time period to file the suit. Another provision of the Act, Section 1369(b)(1), limits the time for the judicial review of the Environmental Protection Agency ("EPA") regulations. The Court held that Section 1369 was not applicable when a party challenges a private defendant for non-compliance with a plausible reading of the EPA regulations. The validity of the rule itself was not being challenged. Thus, this is a "side door" to seeking court review of ambiguous regulations. Additionally, the Court found that the case was not moot, even though the EPA had issued a new stormwater rule clarifying the initial ambiguous version of the rule in question and arguably exempting logging roads. The new EPA rule clarification was filed during the pendency of the Supreme Court's review (November 30, 2012). The Court found the case was not moot because the Court could still review the question of whether there was a past violation of the earlier rule.

The case involved channeled stormwater run-off from two logging roads in the Pacific Coast range west of Portland, Oregon. The defendant, Georgia Pacific, did not obtain NPDES permits for stormwater discharges associated with these roads. The roads in question were used to harvest timber from the forest. When it rained, water ran off the graded roads into a system of ditches, culverts, and channels that discharged pollutants into nearby rivers and streams. The sediment discharged can harm fish and other aquatic organisms.

The Clean Water Act requires NPDES permits for stormwater discharges "associated with industrial activity." 33 U.S.C. §1342(p)(2)(B). The EPA defined "associated with industrial activity" to cover only discharges "... from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw material storage at an industrial plant" (emphasis added). 40 C.F.R. 122.26(b)(14). The EPA interpreted that regulation to exclude from permit requirements "natural run-off" for the logging roads at issue in the case. NEDC argued that the existing regulation fairly includes stormwater discharges and immediate access roads, used or traveled by carriers of raw material.

The Court deferred to the EPA's interpretation to require permits only for traditional industrial sources, such as sawmills. The Court stated that when an agency interprets its own regulations, the Court defers to that interpretation unless the interpretation is plainly erroneous or inconsistent with the regulation. The Court said an agency's interpretation need not be the only possible reading of a regulation or even the best one, to prevail. The Court found the EPA's interpretation was permissible in this case, especially considering the EPA's consistent prior practice in interpreting the rule. The result is that Georgia Pacific did not violate the Act under the earlier version of the rule. This was welcome news to western states, landowners, and logging companies, as well as coastal states.



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Justice Scalia dissented in part and agreed that the NEDC's interpretation was the most plausible and fairest reading in the case. He used the case as a vehicle to question carte blanche judicial deference to agency interpretation of its rules. He felt that the stormwater was being discharged in this case from logging roads through a series of pipes, ditches, and channels, all of which are expressly included as industrial discharges under the EPA's existing definitions. He did not view the stormwater discharges from logging roads as exempt "natural run-off" when they are channeled through man-made structures.

The decision did not involve the new revision to the EPA regulation in 2012, in which the EPA limited relevant "industrial activity" to rock-crushing, gravel-washing, log-sorting, and log storage facilities operating in connection with silvicultural activities only. This rule also would arguably have exempted Georgia Pacific's discharges. However, the dissent said that revision showed that the EPA can clarify its regulations when it wants to and does not have to resort to questionable interpretations. Meanwhile, the NEDC is challenging the new EPA rule under separate litigation, and the EPA is expected to issue further stormwater permit rules for logging roads. It's not over yet.

– [Stanley A. Millan](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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